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TEXAS RULES OF CIVIL PROCEDURE

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No._____

IN THE

Supreme Court of the United States

October Term, 1956

M. J. TIAN, *Petitioner*

v.

JOSIE V. DANIEL BROUSSARD, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

M. J. Tian, petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Texas entered on the 7th day of November, 1956, wherein said Court reversed the judgments of below, and judgment was rendered for respondent.

Opinion Below

Opinion of the Court of Civil Appeals of Texas, entitled *Josie V. Daniel Broussard, Appellant v. M. J. Tian, et al., Appellees.* It is reported in 290 S.W. 2d 372, and is printed in the Appendix, p. 13.

Opinion of the Supreme Court of Texas, entitled *Josie V. Daniel Broussard, Petitioner v. M. J. Tian, et al., Respondents,* 295 S.W. 2d 405. It is printed in the Appendix, p. 11.

Jurisdiction

Petitioner's motion for rehearing was overruled on the 5th day of December, 1956, and the judgment of the Supreme Court of Texas was entered on the 7th day of November, 1956. The judgment is printed in the Appendix, on page 11.

The jurisdiction of this Court is invoked under Title 28, U.S.C.A., Section 1257(3).

The Supreme Court of Texas is not an intermediate court. It is the court of last resort in Texas in all matters within its jurisdiction. Its judgments are not reviewed by any other Texas Court.

Petitioner, in the trial court, and on appeal, contended that there was no evidence introduced by respondent, to show that any part of the property involved in this cause was community property, but on the contrary all the evidence conclusively showed that it was the separate property of petitioner, therefore the holding of the Supreme Court of Texas that part of said property was community property, deprived him of said property without due process of law, in violation of the Fourteenth Amendment to the United States Constitution.

Question Presented

Whether the Supreme Court of Texas erred in holding that any part of the property involved in this cause, was

community property, and in so doing, deprived petitioner of said property, without due process of law, in violation of the Fourteenth Amendment to the Constitution.

Statement of the Case

Respondent brought a suit against petitioner, her former husband, Milton S. Burney and wife, and others not necessary to mention here, to recover an undivided one-half interest in 520.5 acres of land in Limestone County, Texas. The trial was to a jury and the parties stipulated substantially as follows: That the Federal Land Bank of Houston, a corporation, is the common source of title; that respondent, on the 3rd of September, 1935, inter-married with petitioner, and that they were divorced by decree entered in the District Court of Harris County, Texas on the 20th of September, 1942; that on the 24th of July, 1939, and while respondent was the legal wife of petitioner, the Federal Land Bank of Houston executed and delivered to petitioner a deed to the land in question and that as part of the consideration for the deed petitioner executed and delivered to the bank a vendor's lien note in the principal sum of $1,600; that this note was secured by deed of trust executed solely by petitioner, such note and lien securing the same, being the balance due and owing for the purchase price of said land; that on the 26th of April, 1944, petitioner executed and delivered to Burney a deed to all of the surface rights to the land in controversy but reserved from said deed or conveyance all of the oil, gas and minerals in the land, and on the date of the execution of the deed there remained an unpaid balance of $1,036.05 on the $1,600 note aforesaid; that on the 28th of June, 1949 the Federal Land Bank executed a release of the vendor's lien and deed of trust lien which it held to secure the $1,600

note; that the total consideration for the deed from the bank to petitioner was $2,080, and that of that sum $480 was paid in cash by petitioner contemporaneously with the execution and delivery of the deed; that petitioner, prior to his marriage to respondent, had acquired title to a tract of 220 acres of land in Galveston County, and on the 14th of June 1939 he executed and delivered an oil and gas lease on the tract, for which he obtained a cash bonus of $11,000, and it also provided that he was to retain a 1/8 royalty; that the cash payment of $480 petitioner made to the bank was paid out of the $11,000 cash bonus that petitioner received from the oil and gas lease on his separate property; that out of the $11,000 cash bonus aforesaid petitioner also made payment to the Federal Land Bank on the $1,600 note as follows: Dec. 1, 1939, $155.43; Dec. 1, 1940, $207.21; Dec. 1, 1941, $207.21; Dec. 1, 1942, $207.21; Dec. 1, 1943, $207.21; that the Burneys do not claim any title or interest whatsoever in and to the oil and gas or other minerals in the land.

The court submitted one issue to the jury: "Do you find from a preponderance of the evidence at the time the deed from the Federal Land Bank to M. J. Tian was executed that it was agreed and understood between the Federal Land Bank and M. J. Tian that the $1,600 note provided for in said deed would be paid out of the separate property of M. J. Tian?", to which the jury answered "Yes". There was no request for any other issues to be submitted.

Reasons for Granting This Writ

The opinion of the Court of Civil Appeals, in this cause, 290 S.W. 2d 372, makes it clear that the property in con-

troversy, was the separate property of petitioner. The following is taken from said opinion:

"It is our view that under the stipulations made by the parties and the verdict of the jury that this case is ruled by the pronouncements of our Supreme Court in Solether v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S.W. 2d 180, 182, (Com. App., opinion adopted) and Gleich v. Bongio, 128 Tex. 606, 99 S.W. 2d 881, 884. Going back to the Solether case, we find this statement:

" 'It is settled by the statutes and decisions of this state that property acquired by purchase during marriage, whether the conveyance be in the name of the husband or in the name of the wife, or in the names of both, is prima facie community property. * * * This presumption can be rebutted by satisfactory proof, except as to bona fide purchasers and contract lien creditors without notice. * * * Such presumption is rebutted as to the wife when it is established that the property was paid for out of her separate estate. * * * Before the portion of the title represented by notes can be held to belong to the separate estate of the wife, it must be shown 'that it was agreed at the time by the parties to the deed that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds.' (Citing Foster v. Christensen, 67 S.W. 2d 246, Com. App., opinion approved.)

"Going back to the case of Gleich v. Bongio, supra, our Supreme Court, in discussing Foster v. Christensen, said:

" '* * * Judge Smedley clearly expressed the true rule in this language:

" 'The land, of course, presumptively became the community property of Mr. and Mrs. Newgent when it was conveyed to them jointly with no recital of her

separate ownership; but her ownership of the land as her separate property would have been established by proof of the allegations in the answer that the cash payment was made out of her separate funds and that it was agreed at the time by the parties to the deed that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds.'

" 'In the case of Solether v. Trinity Fire Insurance Co. * * * Judge (now Justice) Critz quoted with approval from Judge Smedley's opinion and reannounced the holding made therein. The mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse. To accomplish that purchase the vendor must have agreed with the vendee to look only to his or her separate estate for the satisfaction of the deferred payments.'

"Appellant went to trial on her first amended original petition. The effect of this pleading was to allege that by reason of the time and manner of the purchase of the land by appellee Tian, plus the fact that she was the lawful wife of Tian at the time he purchased the property, she acquired an undivided one-half interest in the land. She did not allege that Tian was guilty of any fraud or concealment in the purchase of the property or payments made thereon, nor did she allege that the property became a homestead. Appellee Tian went to trial on his original answer. This answer consisted of certain admissions showing the date of his marriage to the appellant, the date he acquired the property in question, how he paid for same, and the date he was divorced, and he alleged specifically that the consideration was paid out of moneys derived from his separate estate, and in addition thereto specifically pleaded 'that the entire consideration paid for the land described in plaintiff's original petition * * *

was paid for with the separate funds owned by the defendant prior to his marriage with and to said Josie V. Broussard, and was therefore paid for with his separate estate, and said property when purchased aforesaid and at the present time is the separate estate of the defendant.' He further pleaded: 'The defendant denies all the allegations in plaintiff's petition contained, except such allegations as hereinbefore admitted to be true.'

"On trial evidence was tendered to the effect that Tian made an oral agreement with the agents representing the Federal Land Bank to the effect that he was buying said property with money that he had received from his separate estate and that the bank was to be paid the balance of the purchase price with money received by Tian out of his separate estate, so the vital question here before us is: Did the trial court err in permitting testimony of Tian with the agents representing the land bank concerning the oral negotiations that took place before the deal was consummated? Our view is that he did not.

"First of all, Rule 92, T.R.C.P. provides: 'A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. Where the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff.'

"[1-4] Needless to say, appellant's pleading contained no allegation that required it to be denied under oath. Since the appellant pleaded that the property was the community property of herself and Tian, and since appellant's pleading was not such a plea that was required to be denied under oath, it is our view that Tian's general denial put in issue every fact which was necessary for him to show that the property was not

community property of himself and appellant. We are of the further view that the allegations in Tian's pleading are sufficient to put in issue that the property was Tian's separate property and that it was purchased with such intention. In this connection we think it is pertinent to observe here that the appellant filed no reply to the original answer filed by Tian and did not point out by exception any insufficiency of the pleading, and absent such exception, Tian's answer was entitled to be liberally construed in his favor. See Scott v. Gardner, 137 Tex. 628, 156 S.W. 2d 513, points 1 and 2, 141 A.L.R. 50. Moreover, our 'courts have been liberal in permitting proof as to the nature and source of property and its ownership in suits between a husband and wife.' See Cone v. Cone, Tex. Civ. App. 266 S.W. 2d 480, 483, points 8 and 9 (writ dis.), and authorities there cited. See also Rule 90, T.R.C.P.

"[5] Now bearing in mind that appellant did not plead fraud or bad faith as to the transaction in question, and that the evidence is without dispute that all of the payments made by Tian on the property during coverture were paid in cash out of his separate estate, and that when he sold the property the purchaser paid the balance of the unpaid part of the $1,600 note, we think it affirmatively and indisputably appears that no part of the community property or estate belonging to appellant and Tian was used in the payment of the consideration for the land. There is not a scintilla of evidence that Tian at the time he purchased the property was acting in bad faith, but on the contrary the record shows without dispute that he and appellant had been separated for some time, although not divorced, and Tian made his payments on the property in question out of his separate estate just as he had promised the agents of the bank he would do, and by reason thereof appellant did not acquire any community interest therein, equitably or otherwise. We think our view here is not in conflict with the rule announced in

Binford v. Snyder, 144 Tex. 134, 189 S.W. 2d 471; Faville v. Robinson, 111 Tex. 48, 227 S.W. 938; Naumovich v. Reese, Tex. Civ. App., 247 S.W. 2d 417 (no writ history); Colden v. Alexander, 141 Tex. 134, 171 S.W. 2d 328; Welder v. Lambert, 91 Tex. 510, 44 S.W. 281; Walker v. Simons, Tex. Civ. App., 243 S.W. 2d 600 (n.r.e.); Burgess v. Burgess, Tex. Civ. App., 282 S.W. 2d 118 (n.r.e.).

"[6-8] Under the decisions here cited, we are of the view that the oral testimony tendered as to negotiations between Tian and the representatives of the bank was admissible, and appellant was in no position to challenge the authority of the representatives of the bank. The record is without dispute that Tian had his negotiations in the offices of the bank, and whether the agents negotiating with Tian had authority to bind the bank at the time passes out of the case because the bank accepted the benefits of their negotiations and proceeded to close the trade with Tian, just as Tian detailed the facts and circumstances relating thereto, and Tian proceeded to carry out the details of his trade with the bank just as he promised the agents negotiating for the bank. Certainly Tian was entitled to make a full disclosure of all the transactions he had with the bank leading up to the closing of the transaction, and since his testimony relating to these oral negotiations did not in anywise vary the terms of the contract that he made with the bank, the objections made to Tian's testimony are without merit and the trial court properly admitted the evidence. Moreover, it is also well settled that evidence reasonably satisfactory to the jury is sufficient to overcome the presumption carried by the deed that the land is community property. See Mitchell v. Mitchell, 84 Tex. 303, 19 S.W. 477. See also Johnson v. Burford, 39 Tex. 242.

"Because of the views here expressed the court did not err in overruling appellant's motion for instructed

verdict, nor her motion for judgment non obstante veredicto. We are of the further view that each and all of the other remaining points of appellant pass out of the case, and further discussion would be of no avail. In the event we are mistaken in our views in this behalf, each of appellant's points is overruled.

"Accordingly, the judgment of the trial court is affirmed."

In view of the foregoing, it is petitioner's contention that he has been deprived of property, without due process of law, in violation of the Fourteenth Amendment to the Constitution.

Conclusion

For the foregoing reason, this petition for a writ of certiorari to the Supreme Court of Texas should be granted.

Respectfully submitted,

CHARLES E. HEIDINGSFELDER, JR.
1222 Bank of the Southwest Building
Houston, Texas
Counsel for Petitioner

Certificate

I hereby acknowledge receipt of a copy of the foregoing Petition for Writ of Certiorari this____day of_____, 1957.

FRED C. REEDER
1037 Peerman Place
Corpus Christi, Texas

APPENDIX

JUDGMENT

In The

SUPREME COURT OF TEXAS

November 7, 1956.

No. A-5909
Josie V. Daniel Broussard) From Limestone County,
vs) Tenth District.
M. J. Tian, et al.)

This cause came on to be heard on writ of error to the Court of Civil Appeals for the Tenth Supreme Judicial District, and the original transcript and the transcript showing the proceedings in the Court of Civil Appeals having been duly considered, because it is the opinion of the Court that there was error in the judgments of the courts below, it is *adjudged, ordered,* and *decreed* that the judgments of the Court of Civil Appeals and District Court be, and are hereby, reversed and set aside; and this Court proceeding to render such judgment as should have been rendered below, it is therefore *considered, adjudged, ordered* and *decreed* that petitioner (plaintiff), Josie V. Daniel Broussard, do have and recover of and from respondents (defendants), M. J. Tian and Milton S. Burney and wife, Ida A. Burney, title to and possession of a five-thirteenths (5/13) interest in the 520.5 acres of land in

Limestone County, Texas, as set out and fully described in Plaintiff's First Amended Original Petition, with writ of restitution as prayed for therein, together with all costs in this behalf expended and incurred in this Court, the Court of Civil Appeals and District Court, and that this decision be certified to the District Court of Limestone County, Texas for observance.

* * *

I, GEO. H. TEMPLIN, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the judgment entered on November 7, 1956 by the Supreme Court of Texas in Cause No. A-5909, Josie V. Daniel Broussard vs. M. J. Tian et al., as the original appears of record in the minutes of this office.

WITNESS my hand and the seal of said Court, at the City of Austin, this, the 31st day of December, 1956.

(Seal)

GEO. H. TEMPLIN, CLERK

By JEWELL SEELIGER
(Mrs.) Jewell Seeliger
Deputy

OPINION OF COURT OF CIVIL APPEALS

JOSIE V. DANIEL BROUSSARD, Appellant,

v.

M. J. TIAN et al., Appellees.

No. 3369.

Court of Civil Appeals of Texas. Waco,

April 12, 1956.

Rehearing Denied May 17, 1956.

TIREY, Justice.

Appellant, plaintiff below, brought this suit against M. J. Tian, her former husband; Milton S. Burney and wife, Ida A. Burney; and Martha Inez James (who is a cross-plaintiff) to recover an undivided one-half interest in 520.5 acres of land in Limestone County, Texas. The trial was to a jury and the parties stipulated substantially as follows: That the Federal Land Bank of Houston, a corporation, is the common source of title; that appellant, on the 3rd of September, 1935, intermarried with appellee, M. J. Tian, and that they were divorced by decree entered in the District Court of Harris County on the 20th of September, 1941; that on the 24th of July, 1939, and while appellant was the legal wife of Tian, the Federal Land Bank of Houston executed and delivered to Tian a deed to the land in question and that as part of the consideration for the deed Tian executed and delivered to the bank a vendor's lien note in the principal sum of $1,600; that this note was secured by deed of trust executed solely by Tian, such note and lien securing the same, being the balance due and owing for the purchase price of said land; that on the 26th of April, 1944, Tian executed and delivered to defendant Burney a deed to all of

the surface rights to the lands in controversy but reserved from said deed or conveyance all of the oil, gas and other minerals in the land, and that on the date of the execution of the deed there remained an unpaid balance of $1,036.05 on the $1,600 note aforesaid; that on the 28th of June, 1949 the Federal Land Bank executed a release of the vendor's lien and deed of trust lien which it held to secure the $1,600 note; that the total consideration for the deed from the bank to Tian was $2,080, and that of that sum $480 was paid in cash by Tian contemporaneously with the execution and delivery of the deed; that Tian, prior to his marriage to appellant, had acquired title to a tract of 220 acres of land in Galveston County, and on the 14th of June, 1939 he executed and delivered an oil and gas lease on the tract, for which he obtained a cash bonus of $11,000, and it also provided that he was to retain a 1/8th royalty; that the cash payment of $480 Tian made to the bank was paid out of the $11,000 cash bonus that Tian received from the oil and gas lease on his separate property; that out of the $11,000 cash bonus aforesaid Tian also made payment to the Federal Land Bank on the $1,600 note as follows: Dec. 1, 1939, $155.43; Dec. 1, 1940, $207.21; Dec. 1, 1941, $207.21; Dec. 1, 1942, $207.21; Dec. 1, 1943, $207.21; that the defendants Burney do not claim any title or interest whatsoever in and to the oil and gas or other minerals in the land; that defendant Martha Inez James does not claim any interest in the oil, gas or other minerals in the land.

The court submitted one issue to the jury: "Do you find from a preponderance of the evidence at the time the deed from the Federal Land Bank to M. J. Tian was executed that it was agreed and understood between the Federal Land Bank and M. J. Tian that the $1,600.00 note provided for in said deed would be paid out of the separate

property of M. J. Tian?", to which the jury answered "Yes". There was no request for any other issues to be submitted.

Appellant seasonably objected to the court's charge and after the verdict was rendered seasonably filed her motion for judgment non obstante veredicto, which motion the court overruled, and granted defendant's motion for judgment, and in the decree we find this recital: "* * * and the court, after considering said findings of the jury and other undisputed proof and stipulated facts, is of the opinion and finds that plaintiff should take nothing against M. J. Tian, Milton S. Burney and Ida A. Burney" and decreed accordingly. And the court further decreed that Martha Inez James was not entitled to recover anything on her cross-action against M. J. Tian and the Burneys. Only Josie V. Daniel Broussard has perfected her appeal.

Appellant assails the judgment on what she designates as fifteen points. They are substantially: (1, 3 and 4) the court erred in submitting Special Issue No. 1 on the ground that there is no evidence to support such issue, nor was there any pleading to support the same, because plaintiff objected in writing to such testimony because the evidence affirmatively showed that neither Johnson nor Rosenshaw had authority from the bank to enter into any such agreement; (2) the court erred in admitting the testimony of Tian relating to any oral agreement that he may have had with Vick Johnson or Rosenshaw as agents of the bank on the ground that there was no pleading alleging any such agreement, and further because it was not shown that Johnson or Rosenshaw had any authority to make any agreement with Tian in behalf of the bank; (6) the court erred in submitting Special Issue No. 1 to the jury because plaintiff objected in writing to proof of a prior or con-

temporaneous oral agreement wherein Tian attempted to add to or detract from the terms of the written contract between him and the bank, and the 5th point is to the same effect; (7) the court erred in admitting testimony of Tian relating to any oral agreement between him and the land bank to the effect that the $1,600 note would be paid out of his separate property; (8) the court erred in submitting Special Issue No. 1 because appellant objected in writing that the contract for the conveyance of land is required by the Statute of Frauds to be in writing; (9) the court erred in admitting testimony of Tian relating to any oral agreement between him and the bank, acting by and through Johnson and Rosenshaw as the bank's agents, to the effect that the $1,600 note would be paid out of the separate property of Tian because the contract by a corporation for the conveyance of land must be in writing and signed by the president of the corporation; (10) the court erred in admitting that part of the judgment entered in Cause No. 11472-A in the District Court, 77th Judicial District, Limestone County, styled M. J. Tian vs F. M. James, reading as follows: "The court finds from the evidence that plaintiff (M. J. Tian) was at the time of filing his original petition in said cause, the owner in fee simple of all the oil, gas and other minerals in, upon or under the following tracts of land fully set out and described in plaintiff's original petition filed in this cause, which land is described as follows: (here follows description of land involved in the present suit) because appellant was not a party to the cause of action wherein said judgment was entered, and by reason thereof said judgment is not binding upon her;" (11) the court erred in admitting testimony of the conditional sales contract between Tian and James reading as follows: "* * * that first party (M. J. Tian) represents that this is his

separate property and will convey to second party (F. M. James) full fee title to such property * * * This property was purchased with separate and individual money obtained by leasing land owned by Mr. Tian before Mr. Tian was married."; that the foregoing statements are conclusions of law and that the plaintiff, not being a party to same, said contract was and is not binding on her for any purpose, and that the statements and recitations quoted are self-serving declarations of the defendant Tian; (12) the court erred in rendering judgment for Tian and the Burneys for the reason that the verdict of the jury is contrary to the undisputed evidence; (13) the court erred in rendering judgment in favor of Tian and the Burneys as against this appellant on the verdict of the jury because the verdict is not supported by sufficient evidence; (14) the court erred in overruling motion for instructed verdict against Tian and the Burneys; and (15) the court erred in overruling plaintiff's motion for judgment non obstante veredicto.

It is our view that under the stipulations made by the parties and the verdict of the jury that this case is ruled by the pronouncements of our Supreme Court in Solether v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S.W. 2d 180, 182, (Com. App., opinion adopted) and Gleich v. Bongio, 128 Tex. 606, 99 S.W. 2d 881, 884. Going back to the Solether case, we find this statement:

> "It is settled by the statues and decisions of this state that property acquired by purchase during marriage, whether the conveyance be in the name of the husband or in the name of the wife, or in the names of both, is prima facie community property. * * * This presumption can be rebutted by satisfactory proof, except as to bona fide purchasers and contract lien creditors without notice. * * * Such presumption

is rebutted as to the wife when it is established that the property was paid for out of her separate estate. * * * Before the portion of the title represented by notes can be held to belong to the separate estate of the wife, it must be shown 'that it was agreed at the time by the parties to the deed that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds.' " (Citing Foster v. Christensen, 67 S.W. 2d 246, Com. App., opinion approved.)

Going back to the case of Gleich v. Bongio, supra, our Supreme Court, in discussing Foster v. Christensen, said:

" * * * Judge Smedley clearly expressed the true rule in this language:

" 'The land, of course, presumptively became the community property of Mr. and Mrs. Newgent when it was conveyed to them jointly with no recital of her separate ownership; but her ownership of the land as her separate property would have been established by proof of the allegations in the answer that the cash payment was made out of her separate funds and that it was agreed at the time by the parties to the deed that the land should be her separate property and that the balance of the purchase money should be paid out of her separate funds.'

"In the case of Solether v. Trinity Fire Insurance Co. * * * Judge (now Justice) Critz quoted with approval from Judge Smedley's opinion and reannounced the holding made therein. The mere intention of the husband and wife cannot convert property purchased with an obligation binding upon the community into the separate estate of either spouse.

> To accomplish that purchase the vendor must have agreed with the vendee to look only to his or her separate estate for the satisfaction of the deferred payments."

Appellant went to trial on her first amended original petition. The effect of this pleading was to allege that by reason of the time and manner of the purchase of the land by appellee Tian, plus the fact that she was the lawful wife of Tian at the time he purchased the property, she acquired an undivided one-half interest in the land. She did not allege that Tian was guilty of any fraud or concealment in the purchase of the property or payments made thereon, nor did she allege that the property became a homestead. Appellee Tian went to trial on his original answer. This answer consisted of certain admissions showing the date of his marriage to the appellant, the date he acquired the property in question, how he paid for same, and the date he was divorced, and he alleged specifically that the consideration was paid out of moneys derived from his separate estate, and in addition thereto specifically pleaded "that the entire consideration paid for the land described in plaintiff's original petition * * * was paid for with the separate funds owned by the defendant prior to his marriage with and to said Josie V. Broussard, and was therefore paid for with his separate estate, and said property when purchased aforesaid and at the present time is the separate estate of the defendant." He further pleaded: "The defendant denies all the allegations in plaintiff's petition contained, except such allegations as hereinbefore admitted to be true."

On trial evidence was tendered to the effect that Tian made an oral agreement with the agents representing the Federal Land Bank to the effect that he was buying said

property with money that he had received from his separate estate and that the bank was to be paid the balance of the purchase price with money received by Tian out of his separate estate, so the vital question here before us is: Did the trial court err in permitting testimony of Tian with the agents representing the land bank concerning the oral negotiations that took place before the deal was consummated? Our view is that he did not.

First of all, Rule 92, T.R.C.P. provides: "A general denial of matters pleaded by the adverse party which are not required to be denied under oath, shall be sufficient to put the same in issue. Where the defendant has pleaded a general denial, and the plaintiff shall afterward amend his pleading, such original denial shall be presumed to extend to all matters subsequently set up by the plaintiff."

[1-4] Needless to say, appellant's pleading contained no allegation that required it to be denied under oath. Since the appellant pleaded that the property was the community property of herself and Tian, and since appellant's pleading was not such a plea that was required to be denied under oath, it is our view that Tian's general denial put in issue every fact which was necessary for him to show that the property was not community property of himself and appellant. We are of the further view that the allegations in Tian's pleading are sufficient to put in issue that the property was Tian's separate property and that it was purchased with such intention. In this connection we think it is pertinent to observe here that the appellant filed no reply to the original answer filed by Tian and did not point out by exception any insufficiency of the pleading, and absent such exception, Tian's answer was entitled to be liberally construed in his favor. See Scott v. Gardner, 137 Tex. 628, 156 S.W. 2d 513, points

1 and 2, 141 A.L.R. 50. Moreover, our "courts have been liberal in permitting proof as to the nature and source of property and its ownership in suits between a husband and wife." See Cone v. Cone, Tex. Civ. App., 266 S.W. 2d 480, 483, points 8 and 9 (writ dis.), and authorities there cited. See also Rule 90, T.R.C.P.

[5] Now bearing in mind that appellant did not plead fraud or bad faith as to the transaction in question, and that the evidence is without dispute that all of the payments made by Tian on the property during coverture were paid in cash out of his separate estate, and that when he sold the property the purchaser paid the balance of the unpaid part of the $1,600 note, we think it affirmatively and indisputably appears that no part of the community property or estate belonging to appellant and Tian was used in the payment of the consideration for the land. There is not a scintilla of evidence that Tian at the time he purchased the property was acting in bad faith, but on the contrary the record shows without dispute that he and appellant had been separated for some time, although not divorced, and Tian made his payments on the property in question out of his separate estate just as he had promised the agents of the bank he would do, and by reason thereof appellant did not acquire any community interest therein, equitably or otherwise. We think our view here is not in conflict with the rule announced in Binford v. Snyder, 144 Tex. 134, 189 S.W. 2d 471; Faville v. Robinson, 111 Tex. 48, 227 S.W. 938; Naumovich v. Reese, Tex. Civ. App., 247 S.W. 2d 417 (no writ history); Colden v. Alexander, 141 Tex. 134, 171 S.W. 2d 328; Welder v. Lambert, 91 Tex. 510, 44 S.W. 281; Walker v. Simons, Tex. Civ. App., 243 S.W. 2d 600 (n.r.e.); Burgess v. Burgess, Tex. Civ. App., 282 S.W. 2d 118 (n.r.e.).

[6-8] Under the decisions here cited, we are of the view that the oral testimony tendered as to negotiations between Tian and the representatives of the bank was admissible, and appellant was in no position to challenge the authority of the representatives of the bank. The record is without dispute that Tian had his negotations in the offices of the bank, and whether the agents negotiating with Tian had authority to bind the bank at the time passes out of the case because the bank accepted the benefits of their negotiations and proceeded to close the trade with Tian, just as Tian detailed the facts and circumstances relating thereto, and Tian proceeded to carry out the details of his trade with the bank just as he promised the agents negotiating for the bank. Certainly Tian was entitled to make a full disclosure of all the transactions he had with the bank leading up to the closing of the transaction, and since his testimony relating to these oral negotiations did not in anywise vary the terms of the contract that he made with the bank, the objections made to Tian's testimony are without merit and the trial court properly admitted the evidence. Moreover, it is also well settled that evidence reasonably satisfactory to the jury is sufficient to overcome the presumption carried by the deed that the land is community property. See Mitchell v. Mitchell, 84 Tex. 303, 19 S.W. 477. See also Johnson v. Burford, 39 Tex. 242.

Because of the views here expressed the court did not err in overruling apptllant's motion for instructed verdict, nor her motion for judgment non obstante veredicto. We are of the further view that each and all of the other remaining points of appellant pass out of the case, and further discussion would be of no avail. In the event we are mistaken in our views in this behalf, each of appellant's points is overruled.

Accordingly, the judgment of the trial court is affirmed."

OPINION OF SUPREME COURT OF TEXAS

JOSIE V. DANIEL BROUSSARD, Petitioner,

v.

M. J. TIAN, et al., Respondents

No. A-5909

Supreme Court of Texas

Nov. 7, 1956

Rehearing Denied Dec. 5, 1956

GARWOOD, Justice.

This suit is one by the petitioner-plaintiff, Mrs. Broussard, for her half of an alleged 10/13 community interest in 520.5 acres of land in Limestone County, which latter was purchased by her former husband, the defendant-respondent, Tian, during their marriage, from the Federal Land Bank, the total consideration of $2,080 being $480 cash, which was paid out of the separate property of Tian, and $1,600 evidenced by a vendor's lien executed by him. Joined as codefendants were certain grantees or successors in title to Tian, but the rights of these additional parties (including Francis M. and Inez James, who admittedly may be now considered as without interest in the property) are not alleged to be any better than those of the respondent-defendant, Tian. The judgment of the trial court, affirmed by the Court of Civil Appeals, 290 S.W. 2d 372, was against the petitioner-plaintiff. Our holding is to the contrary.

There is no written purchase contract in evidence. The deed, which ran to Tian, and the vendor's lien note and deed of trust, which he alone executed, contained no re-

citals purporting to deal with the community or separate status of the purchase or source of the consideration. However, not only the aforementioned $480 cash payment, but also several substantial payments of principal and interest on the note, were made out of the separate property of Tian, the balance due on the note being paid by his co-defendant-grantees, and the community estate having thus paid out no money at all on the purchase.

[1, 2] On the other hand, as appears to be conceded—and necessarily so—by the respondents-defendant, the vendor's lien note being executed during the marriage by the husband, who is the community manager, and there being nothing in the note or related instruments to the contrary, the note is by presumption and in legal effect a community obligation, unless somehow lawfully shown to be otherwise. In the absence of any such showing, the result would necessarily be that, to the extent of the face of the note, the community furnished the original consideration for the purchase and thereby acquired a pro tanto ownership in the property, to wit, a 1600/2080 or 10/13 interest, of which the wife's half would be 5/13. The fact that the actual payment of all or some of the installments of the note were later made out of separate funds of the husband would not affect the community ownership, but would merely give rise to a debt or charge in favor of his estate against the community enforceable by appropriate proceedings. Gleich v. Bongio, 128 Tex. 606, 99 S.W. 2d 881, in our view amply supports the foregoing statements. See also Solether v. Trinity Fire Ins. Co., 124 Tex. 363, 78 S.W. 2d 180.

[3] It is also necessarily conceded that, assuming the above-mentioned showing as to the non-community charac-

ter of the note could be made by parol, as, under the facts here, it would have to be if made at all, the respondents-defendant had the burden of making it. In this connection they introduced, over the objection of the petitioner-plaintiff, testimony of Tian which, when taken with other circumstances in evidence, they contend to be proof of an agreement between the grantor, Federal Land Bank, and Tian, sufficient under the above cited decisions, to make the note a separate property obligation of Tian and the property therefore entirely his separate estate. The single jury issue in the case was submitted under this theory, in response to which the jury found that there was such an agreement that the note "would be paid out of the separate property of M. J. Tian." If that finding is invalid, the judgment of the courts below against the petitioner-plaintiff cannot be sustained.

The petitioner-plaintiff asserts, in addition to other contentions, that the finding is wholly unsupported by the above-mentioned proof tendered by the respondents-defendant, even if parol evidence of such an agreement were admissible. We agree with this contention, and accordingly forego ruling on the other points raised by the petitioner-plaintiff, including the question of parol evidence.

The relevant portion of Tian's above-mentioned testimony is set out in the footnote.[1] It does tend to establish

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1 "Q. What, if anything, did you tell them with regard to how you were going to make those payments, Mr. Tian? A. Mr. Dodson, I stood there, and I guess about 4 or 5 hours talking to him and he asked me emphatically how could I pay it. I said I owned surface soil. I have got royalty in a chain of title under a Gulf lease. I said I have got a lease that I have just made with Stanolind, and I said I can pay it out of the royalty * * *. He (Johnson) told me that he would have to go to the Board of Directors to get permission to all of their agreements.

that the representatives of the grantor were interested in knowing whether Tian had means of one kind or another so as to render it probable that the note would be paid, and that Tian assured them he had certain means, which were of his separate estate, and intended to use these means to make payments. The respondents-defendant themselves, in their answer to the application, describe this testimony as follows:

> " * * * and during this discussion, Johnson asked Tian, 'how he expected to make the deferred payments on this land?' Tian told him that he had just received some bonus money from an oil lease and that he had some royalty under land that was being developed by the Gulf Oil Company, and that he could pay it out of this lease money, or out of the Gulf royalty. He then stated that this property was his separate property."

They then go on to say that this testimony plus the agreed facts that the sale was duly closed and the cash and sundry installment payments on the note were made by Tian out of his separate property lease money tends to show an "understanding that it (the note) would be paid out of his separate funds as he had stated."

Possibly the proof does amount to an "understanding" in the sense that both parties considered the existence of the

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I told him I would pay it out of this lease I had and out of royalty I had from the Gulf.

"Q. Did you or not tell him that that was your separate property? A. Absolutely my separate, I bought this Gulf out of some money I got from * * *.

"Q. Outside of this 520 acres of land did you buy any real estate during the time that you and your wife were married? A. About four or five pieces."

oil properties in question as a factor favorable to due discharge of the note. But it does not reflect a contract that it was to be paid out of these properties in particular, still less out of the separate property of Tian generally. The tenor of the discussion was simply that of an enquiry by the bank into the general prospects of the note being ultimately paid and an answer to that enquiry. The account of the conversation includes no statement from the bank representatives that they would make or recommend the sale on the strength of Tian's statement about his oil property or that the sale was to be conditioned on such property being retained by him or devoted to payment of the note, which was, of course, already secured by the vendor's lien. Still less is there anything to suggest that the bank, which initiated the discussion, had any interest in whether the source of payment of the note should be separate or community.

The events subsequent to the conversation do not modify or amplify the words favorably to Tian's contention. Considering that the grantor was an institution specializing in land loans and related transactions, the actual consummation of the sale without any written reference to the oil properties or to the separate or community character generally of the purchase suggests that there was not a special contract in this behalf rather than that there was. The fact that the cash consideration and part of the note were later paid out of money accruing from the oil properties might well have been due to reasons other than an obligation so to pay them.

The fact that at the time of the purchase the spouses had been living apart for a considerable period does suggest a motive for Tian to avoid a community obligation; but

the possibility or even probability of a general purpose to do business as a single man does not, under the circumstances, afford any proof of a contract between him and the bank to this effect. There is no proof that he discussed his domestic situation with the bank representatives. Actually, his reply to the question of whether he told the bank that his oil properties were separate is equivocal, although we assume it to mean that he did so state.

The judgments below are accordingly erroneous and must be reversed, and the petitioner, Mrs. Broussard, is entitled to recover against the respondents Tian and Burney her 5/13 interest in the property in question. Since the respondents have no alternative pleas for recovery of sums actually paid on the purchase money note, and no reason for remanding the case thus or otherwise appears, judgment must be here rendered for the petitioner for her interest aforesaid. It is so ordered.